

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
ECKHART, et al., : Docket #1:20-cv-05593-
 : RA-GWG
 :
 Plaintiffs, :
 :
 - against - :
 :
 FOX NEWS NETWORK, LLC, et al., : New York, New York
 : May 9, 2022
 Defendants. :
 : TELEPHONE CONFERENCE
 ----- :

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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PROCEEDINGS

4

THE CLERK: -- in the matter of Eckhart et al v.
Fox News Network LLC et al, case number 20-cv-5593.

Starting with plaintiffs' counsel, please state
your appearance for the record.

MR. MICHAEL J. WILLEMIN: Good morning, your Honor.
This is Michael Willemin with Wigdor LLP for the plaintiff.
And I'm joined by my law clerk, Christina Sabato.

HONORABLE GABRIEL W. GORENSTEIN (THE COURT): Do
we have someone for the defendant?

MS. RACHEL FISCHER: Good morning, your Honor.
This is Rachel Fischer of Proskauer Rose for defendant Fox
News. And also on the line are Kathleen McKenna and Yonatan
Grossman-Boder, also from Proskauer.

THE COURT: Okay.

MS. CATHERINE FOTI: Good morning, your Honor. This
is Catherine Foti from Morvillo, Abramowitz, Grand, Iason, &
Anello, on behalf of the defendant, Ed Henry. And I'm joined
by my associate, Douglas Chalke.

THE COURT: Okay. So let me just tell everyone
we're being recorded, in case anyone orders a transcript.
But any further recording or dissemination of the proceeding
is prohibited. Please also keep your cell phone on mute
unless you're actually speaking to the Court.

We're here based on a letter dated April 21st from

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PROCEEDINGS

5

the defendant and a response dated April 25th. So I'll hear from the defendant since it's their application.

MS. FISCHER: Thank you, your Honor. This is Rachel Fischer of Proskauer. Fox is seeking discovery concerning plaintiff's alleged emotional distress damages. Specifically, Fox is seeking HIPAA-compliant authorization for plaintiff's medical records from January 2, 2013, through the present. And the reason Fox is seeking discovery is because plaintiff put her mental health at issue by alleging emotional distress damages in this case, including -- and this is from the Third Amended Complaint -- severe mental anguish, emotional distress, post-traumatic stress; and plaintiff further alleges that she's had to seek weekly therapy from a trauma specialist in connection with the alleged damages and distress that she has experienced.

She is seeking --

THE COURT: If I can just sort of jump in, Ms. Fischer --

MS. FISCHER: Sure.

THE COURT: -- I actually, I read the letters. You know, obviously, they're not protesting producing any emotional distress -- I'm sorry -- psychiatric-type records. So what we really have to focus on is, I think,

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PROCEEDINGS

6

two things. One is are there some sort of records you get to look at to figure out whether there have been traumas to her that should cause -- that, you know, might have caused emotional distress and that might lead you to other records, or would you just get all records on the theory that any medical procedure or dental procedure can cause emotional distress and you should be able to look at all of them. So that's the real issue here and you should address that.

MS. FISCHER: Well, your Honor, I believe there is actually an additional issue with respect to the mental health records, because it's plaintiff's position, as we understand it, that although she concedes that her -- you know, she's put her mental health at issue, her position is that she does not have to provide us with HIPAA authorizations and that she can instead obtain her records directly from her providers, go through them and then decide which pieces of those records she wants to produce, which we believe is highly problematic. So even on the mental health records --

THE COURT: Let's do it in two pieces, then. Let's just do the actual psychiatric, psychological therapy providers. Is there an objection to providing HIPAA authorizations for those --

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PROCEEDINGS

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MR. WILLEMIN: No --

THE COURT: Mr. Willemmin?

MR. WILLEMIN: Oh, sorry. We -- thank you, your Honor. We have the records. We can provide separate HIPAA authorizations if the defendants want. But, I mean, we have all the records. I mean, we sent our own, obviously, HIPAA authorization, and we're happy to turn over everything that we got from them. We're not trying to pick and choose. If they feel more comfortable having a HIPAA, you know, authorization for those, I think it's three individuals, as well, then we can -- you know, I don't have an issue providing that.

THE COURT: Okay. Does that answer your question, Ms. Fischer?

MS. FISCHER: Yes, it did. Thank you.

THE COURT: All right, so let's go onto the physical part.

MS. FISCHER: Okay. With respect to the, you know, physical or medical records, again, you know, we -- first of all, she --

THE COURT: No, before you answer that, do we know that type of providers we're talking about? I assume there's some general practitioner or, you know, frontline doctor that we're talking about. Anything else in addition

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PROCEEDINGS

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that we know? You know, did she provide you a list of providers?

MS. FISCHER: No, she did not. So we really don't know what the universe is of potential records that are out there. We have not been provided with that information, although we've asked for it.

MR. WILLEMIN: So --

THE COURT: Okay. Go ahead. I interrupted you.

No, no, no, I want to hear out Ms. Fischer. Then I'll hear from you, Mr. Willemin.

MS. FISCHER: Plaintiff does allege physical injury as a result of her alleged rape by Mr. Henry, which I'd also like to point out. So she does allege --

THE COURT: I didn't see that in your letter. I'm sorry, was that in your letter? I missed that.

MS. FISCHER: I believe it is. I don't have it at my fingertips.

THE COURT: I mean, I saw you're saying that there was a chronic physical injury which they said you misunderstood, but I didn't see anything else -- oh, yes, you do mention the specific claims of physical injury.

MS. FISCHER: Yes. I think it's on page three.

THE COURT: Yes, I see it now.

Okay, well, and I don't have those paragraphs, the

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PROCEEDINGS

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Complaint in front of me. Is this alleged physical injury from a sexual act?

MS. FISCHER: Yes.

THE COURT: Oh, okay.

MS. FISCHER: That's the --

THE COURT: So --

MS. FISCHER: That's an allegation. But in addition, you know, as the Court noted, we are seeking discovery, you know, because discovery on this subject may reveal, you know, whether there were other medical issues, other issues that may have been going on that caused the plaintiff to suffer the emotional distress that she attributes to the defendants in this case.

THE COURT: Right. Well, that's the part that I'm trying to get you to address, because it's not intuitive to me that -- you know, obviously, there are many things in life that can cause emotional distress beyond doctors' visits or medical -- I should say beyond medical conditions, including, you know, personal problems and a million other -- and, you know, repair on your house. I mean, there's a million things that can cause emotional distress. So I think you have a little bit of a tough row to hoe if you say, well, I want to pore over the medical records to see if there's something there that might have

1 PROCEEDINGS 10

2 caused emotional distress because there's no -- there
3 doesn't seem to be any limitation to that principle.

4 MS. FISCHER: Well, this is something that --

5 THE COURT: You could start questioning all her
6 friends and relatives about anything about whether they'd
7 ever observed any emotional distress in her life from any
8 source. I mean, I just -- I'm trying to figure out what
9 the limiting principle is, if any.

10 MS. FISCHER: Well, there is, you know, support
11 that this has been done in employment discrimination cases.
12 But we do think in light of the allegations here involving
13 an alleged rape and physical issues related to that,
14 allegedly, that at a minimum, plaintiff should provide
15 authorizations for her primary care provider as well as any
16 gynecological records, because that would go specifically
17 to the allegations in this case, meaning, you know, if
18 there's some underlying issue or something in her records,
19 she has alleged physical injury, we should be entitled to
20 review those records and see whether there was some
21 preexisting condition, preexisting issue that we should be
22 able to probe that in discovery. You know, although there
23 may be many different types of stressors that can cause
24 emotional distress, you know, to the Court's point, you
25 know, renovations on your house or something like that, you

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PROCEEDINGS

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know, we are -- we believe we are entitled to review documents related to physical injury and illness because, you know, those are very real stressors even if they're not the only stressors that plaintiff may have had in her life at the time.

THE COURT: All right, Mr. Willemmin?

MR. WILLEMIN: I just think that there's a pretty gross misrepresentation of the physical injuries that our client's alleging. Our client alleges that when she was raped in 2017, that she was also hit in the face and that she was left with scratches and bruising. She never went and got any medical treatment in connection with those injuries. She doesn't claim to have, you know, ongoing, chronic physical injury as a result of this. She was beat up by Mr. Henry. And she didn't go to the hospital for it. And that's -- you know, that's what she'll testify to. And so I don't really see how under that circumstance there could be such a wide swath of medical records that would be conceivably reviewed by the defense.

And I'm not saying that there are no cases in which that's ever happened, but very, very, very rarely, because we deal with this issue a lot when defense try to overreach, there's a court order, a complete production of medical files for, you know, a nine-year period. So we

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PROCEEDINGS

12

have the -- the other doctors other than -- I mean, we didn't get records from dentists or what-have-you yet. But the other doctors that we have records from are her primary care doctor and her OB-GYN, the latter of which we don't have the records yet but we've sent the HIPAA out. And to the extent that there are, you know -- I mean, we can meet and confer after receiving the records to the extent that there's some sort of, you know, chronic illness that, you know, needs to be potentially disclosed. I think the better course would be, as we've suggested, that our client be asked questions at her deposition about any sort of you know, chronic illness or any sort of, you know, more significant health issue that could potentially be causing distress. We'll try to get out in front of that once we get the records, if we can, so, you know, as to make things most sufficient.

But, you know, we're producing the records from the two trauma counselors and the therapist. There are two hospitals that we're in the process of getting records from -- well, I think it's one doctor and one hospital that she saw immediately after having panic attacks in the last few years. So all of the emotional distress stuff is, you know, going to be produced. And then I don't see at this stage why she should have to produce nine years of

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PROCEEDINGS

13

gynecological records. I mean, she doesn't claim that he gave her an STD or, you know, or anything of the sort.

THE COURT: I'm sorry, what did you say existed in terms of records about panic attacks and so forth?

MR. WILLEMIN: Yeah, there's one -- she had a panic attack in 2019 after which she saw a doctor. And we've received records in connection with that panic attack. And then there was another panic attack that she had in 2017 when she was in Atlanta, and she went to the hospital. And we have sent the HIPAA in connection with those records, and we're just still awaiting them. So, I mean, those two, as well, if defendants want a HIPAA of their own, I mean, that's fine. But between those two and the three, you know, the two trauma counselors and the therapist, that's all the emotional distress, you know, mental health records that -- and we're not objecting to producing any of that.

MS. FISCHER: Your Honor, may I respond?

THE COURT: Go ahead.

MS. FISCHER: Well, first of all, you know, a lot of this is new information to us because, although we asked for it, even in the meet-and-confers, we weren't -- you know, we were kept in the dark on all of this. But, in any event, you know, plaintiff is claiming emotional distress

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PROCEEDINGS

14

since she met Henry and in dealing with Henry. You know, there's plenty of case law which we've cited that authorizes the disclosure of medical records in these circumstances. And now, you know, we're hearing about these panic attacks and she's going to the hospital, well, we should be permitted to probe whether there were other medical conditions going on, you know, including but not limited to at that time. You know, we shouldn't have to just rely on what she says, "Oh, this is a mental health record as opposed to a medical record," we should be permitted to investigate well, is there a, you know, medical component of this. And I think the fact that the plaintiff herself has now obtained her primary care and OB-GYN records, which again we did not know before five minutes ago that she was going to do that, you know, that would seem --

MR. WILLEMIN: We -- that was our proposal. You wrote to --

THE COURT: Hold on. Hold on. Mr. Willemin, do not interrupt.

MS. FISCHER: No, the --

THE COURT: Go ahead.

MS. FISCHER: -- the proposal that was given, which is what I articulated earlier, which was plaintiff

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PROCEEDINGS

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would, you know, go through her records and weed through them and, you know, decide what she's going to produce. But, you know, we would like the opportunity to review them ourselves. We shouldn't have to rely on plaintiff to do that. And we are permitted, you know, under plenty of case law, including the cases that we've cited to the Court, the *DeSouza* case, the *Presley* case, to probe whether there were other medical events going on in plaintiff's life at the time that she alleges that she was under emotional distress due to Mr. Henry's interactions with her.

THE COURT: Mr. Willemmin, you wanted to add something?

MR. WILLEMIN: No, I just -- I don't think it's fair to say that they didn't know we were getting these records. I mean, that's literally what we told them we were going to do and what now counsel has articulated twice. But just -- we're not, like, sandbagging anybody, but I don't have anything further in terms of the substantive arguments. And I apologize for my interruption.

THE COURT: All right, so certainly we need in writing a list of medical providers that she has seen for some reasonable period -- and I think five years before is plenty. So May 2012 -- is it May when the --

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PROCEEDINGS

16

MR. WILLEMIN: The rape itself I believe was in February of 2017.

THE COURT: Okay. So February 2012 until the present. So we'll start with that.

The -- I mean, the primary care physician -- I gather there is a primary care physician, is that right?

MR. WILLEMIN: Yes.

THE COURT: Okay. The primary care, I'm not prepared at this point to say that the defendants should be able to comb through the primary care records to see if there was something serious in her life that might have also caused emotional distress. I just -- I just don't see a limiting principle. I know there are some cases that have adverted to that happening, but nothing that really contains a discussion or makes clear that the plaintiff was even protesting it in some of those cases.

However, the plaintiff needs to go through the primary care records, and any reference at all to any mental problem at all, nervousness, anxiety, distress, anything like that, the record has to be produced. So, I mean, you know, the fact is we trust entities to look through their own records for responsive documents. We don't make them produce their entire email files. We trust them to go through it and do searches in a particular way.

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PROCEEDINGS

17

So, Mr. Willemmin, you have to be responsible for the search. This is not something the plaintiff herself is going to do. You or someone from your firm has to make a serious effort to go through this, and anything at all that relates to any psychological condition needs to be, those records need to be produced from the primary care physician. I don't know who these other providers are. I wouldn't make you go through dental records to see if there's such records, but, you know, if there's some other provider once we get the list that seems appropriate to look for emotional distress references in the records, then, you know, we can -- you've got to agree to reveal to the defendants or they can come back to me if you can't reach agreement on it.

So we need the list of providers in interrogatory response form or in a letter, if that's satisfactory to the defendants. And you need to -- have you gotten the primary care records already?

MR. WILLEMIN: We just got those. And there's one other outstanding one that we're waiting on; that's the OB-GYN, which I'm also not objecting to reviewing for such --

THE COURT: Yes, you need to review the OB-GYN ones, as well, for the same purpose. So that should be done in short order, you know, in the next week unless you

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PROCEEDINGS

18

folks agree otherwise.

Okay, anything else on that issue, Ms. Fischer?

MS. FISCHER: No, I don't believe so.

MS. FOTI: It's Catherine Foti. I just wanted, your Honor, just to make sure that we are just on record. We served requests, but the responses were not yet due, so we're not suggesting that the plaintiffs haven't provided us with anything that we've asked for. But they were similar requests to what you have just ruled on today, and we just want to confirm that, obviously, you've been referring to the defendants that whatever is produced to Fox will in fact be produced to us. We've agreed that the parties will share all the discovery. But I just wanted to, you know, obviously make a record that, you know, we assume that the plaintiffs will -- that their response will be consistent in terms of our requests, as well.

THE COURT: Okay. Well, whatever the Fox News gets, obviously, the other defendants should get.

MS. FOTI: Thank you, your Honor.

THE COURT: Okay. So I can't tell if there's even an issue remaining here. I gather the plaintiff doesn't have any diaries.

MR. WILLEMIN: No, not --

THE COURT: What does the plaintiff have that's

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PROCEEDINGS

19

responsive to this?

MR. WILLEMIN: Well, she -- I mean, the way that it was originally written, I mean, I think she has, you know, plenty of stuff in terms of her hard drives and so on and so forth that relate to Fox News or Ed Henry. And anything that she has related to Fox News or Ed Henry she'd produce, whether it's in a calendar, whether it's in a diary, whether it's in a notebook; you know, anything in her possession that relates to the issues that are relevant to the case, mitigation, Fox News, Ed Henry, etc., you know, she'll produce. She didn't maintain -- my understanding is that she didn't maintain a diary while she was working for Fox News. Since she left Fox News, she has taken some sort of notes to self. I don't know that I'd characterize it as a diary, but we're going to produce those because they relate to Fox News and to Ed Henry.

And so, I mean, just like any -- just like, for instance, you know, our client has a whole email account, we wouldn't produce the whole email account; we'd review it as we would a diary, a notebook, a calendar or anything to make sure that anything that is relevant and responsive gets turned over. And it just so happens she doesn't have a diary for that time period, anything. And her calendar, as I understand it, was maintained on Fox News' systems.

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PROCEEDINGS

20

THE COURT: So, Ms. Fischer, what's left on this?

MS. FISCHER: Well, again, this was new information to us in their letter. And I think that resolves virtually all of the issues.

The other issue we had -- you know, the other issue relevant to the calendars is documents reflecting plaintiff's whereabouts and dates that she was later absent from work, which conceivably could be calendar entries or it could be other documents reflecting where she was. And I'm not sure if there's still an objection to producing that information.

THE COURT: Yes, I think you have to provide the dates you want.

MS. FISCHER: Okay.

THE COURT: So do you have some list of dates?

MS. FISCHER: Yeah, we can provide the dates. We can provide the dates and then --

THE COURT: Okay, so provide the dates. And you should provide any calendar entries, Mr. Willemmin, or if there's some way to figure out something else that relates to her whereabouts on those dates, then provide it. I'm not sure there would be anything else, but if you can figure out anything else. Understood, Mr. Willemmin?

MR. WILLEMIN: Yes. yes, your Honor.

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PROCEEDINGS

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THE COURT: Ms. Fischer, anything else we need to
do today?

MS. FISCHER: No, your Honor.

THE COURT: Mr. Willemin, anything?

MR. WILLEMIN: No, thank you, your Honor.

THE COURT: Okay. Thank you. Good-bye, everyone.
(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Eckhart et al v. Fox News Network, LLC et al, Docket #20-cv-05593-RA-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: May 10, 2022